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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA - SANTA ROSA DIVISION

In re

SERGIO H GARCIA ,

Debtor(s).

Case No.10-11914-AJ

Chapter 7

R.S. No. MAW-1958

MOTION FOR RELIEF FROM
AUTOMATIC STAY
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: July 22, 2010

TIME: 9:00 am

99 South "E" Street
Santa Rosa, CA 95404-6524

JPMorgan Chase Bank, National Association¹ ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to enforce its security interest in real property generally described as 1203 Hughes Avenue, Santa Rosa, California 95407.

On or about May 19, 2010, Sergio H Garcia ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and Timothy W. Hoffman was appointed as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtor and the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

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¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and
2 362(d)(2).

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4
5 **I.**

6 **MOVANT IS ENTITLED TO RELIEF FROM THE**
7 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**
8 **NO EQUITY**

9 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
10 debtor does not have any equity in the property and the property is not necessary to the debtor's
11 effective reorganization.

12 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
13 § 362(d)(2) reflects congressional intent to allow creditors to
14 immediately proceed against the property where the debtor has no
15 equity and it is unnecessary to the reorganization, even where the
16 debtor can provide adequate protection under § 362(d)(1).
(Emphasis added).
Id. at 610 (emphasis added).

17 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court
18 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all
19 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief
20 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194
21 (9th Cir. 1984).

22 An appropriate cost of sale factor should also be added to determine if the debtor has
23 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.
24 283, 289 (Bankr. S.D. Cal. 1982).

25 On or about June 15, 2005, Debtor, for valuable consideration, made, executed and
26 delivered to SCME Mortgage Bankers, Inc. ("Lender") a Note in the principal sum of
27 \$390,000.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make monthly principal
28 and interest payments commencing August 1, 2005, and continuing until July 1, 2035, when all

1 outstanding amounts are due and payable. The Note provides that, in the event of default, the
2 holder of the Note has the option of declaring all unpaid sums immediately due and payable. A
3 true and correct copy of the Note is attached to the Declaration in Support of Motion for Relief
4 From Automatic Stay as exhibit A and incorporated herein by reference.

5 On or about June 15, 2005, the Debtor made, executed and delivered to Lender a Deed
6 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
7 described as 1203 Hughes Avenue, Santa Rosa, California 95407 (the "Real Property"), which
8 is more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and
9 costs incurred as a result of the Debtor's bankruptcy case may be included in the outstanding
10 balance under the Note. The Deed of Trust was recorded on June 23, 2005, in the Official
11 Records of Sonoma County, State of California. A true and correct copy of the Deed of Trust is
12 attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit B
13 and incorporated herein by reference.

14 Subsequently, all beneficial interest in the Deed of Trust was sold, assigned and
15 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust
16 evidencing the Assignment of the Deed of Trust to Movant is attached to the Declaration in
17 Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by
18 reference.

19 The obligation under the Note is in default as of December 1, 2008, for failure to make
20 payments to Movant. As of May 22, 2010, the total obligation due and owing under the Note is
21 in the approximate amount of \$494,931.07, representing the principal balance of \$435,010.89,
22 interest in the sum of \$40,230.57, late charges in the amount of \$83.76, escrow advances in the
23 amount of \$20,115.42, a recoverable balance in the amount of \$285.00, other charges in the
24 amount of \$10.85, and less a suspense balance in the amount of \$<805.42>. This is an
25 approximate amount for purposes of this Motion only, and should not be relied upon as such to
26 pay off the subject loan as interest and additional advances may come due subsequent to the
27 filing of the Motion. An exact payoff amount can be obtained by contacting Movant's counsel.
28 Further, Movant has incurred additional post-petition attorneys' fees and costs in bringing the

1 instant Motion. Moreover, the total arrears under the Note are in the approximate sum of
2 \$35,531.28, excluding the post-petition attorneys' fees and costs incurred in filing the instant
3 Motion. A true and correct copy of the contractual payment accounting pursuant to Local Rule
4 4001-1(g)(1) is attached to the Declaration in Support of Motion for Relief From Automatic
5 Stay as exhibit D and incorporated herein by reference.

6 **II.**

7 **RELIEF FROM STAY**

8 **LACK OF EQUITY**

9 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and
10 Statements, the fair market value of the Property is \$270,000.00. True and correct copies of the
11 Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Declaration in
12 Support of Motion for Relief From Automatic Stay as exhibit E and incorporated herein by
13 reference.

14 Based on the above, Movant maintains that the equity in the Property is as follows:

| | | |
|----|--|--------------------|
| 15 | Fair Market Value: | \$270,000.00 |
| 16 | Less: | |
| 16 | Movant's Trust Deed | \$494,931.07 |
| 17 | Wells Fargo Bank N A's 2nd Deed of Trust | \$53,140.00 |
| 17 | Costs of Sale (8%) | <u>\$21,600.00</u> |
| 18 | Equity in the Property: | <\$299,671.07> |

19 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since
20 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is
21 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

22 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real
23 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtor's
24 Statement of Intent is attached to the Declaration in Support of Motion for Relief From
25 Automatic Stay as exhibit F and incorporated herein by reference.

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III.
MOVANT IS ENTITLED TO RELIEF FROM THE
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).
CAUSE - LACK OF ADEQUATE PROTECTION

Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate protection of its interest in the Property.

Movant submits that adequate protection in this case requires normal and periodic cash payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

Movant is informed and believes that Debtor is presently unwilling or unable to provide adequate protection to the Movant and there is no probability that adequate protection can be afforded to Movant within a reasonable time.

By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C. § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

WHEREFORE, Movant respectfully prays for an Order of this court as follows:

1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of Trust;
2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;
3. Granting Movant leave to foreclose on the Real Property and to enforce the security interest under the Note and the Deed of Trust, including any action necessary to obtain possession of the Property;
4. Permitting Movant to offer and provide Debtor with information re: a potential Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;
5. Alternatively, in the event this court declines to grant Movant the relief requested above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to reinstate and maintain in a current condition all obligations due under the Note and Deed of

1 Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations
2 to pay when due (a) the monthly installments of principal and interest, as required under the
3 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor
4 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs
5 incurred in the filing of this motion;

6 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion
7 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy
8 law; and

9 7. For such other and further relief as the court deems just and proper.

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11 Dated: June 22, 2010

PITE DUNCAN, LLP

12 /s/ MELODIE A. WHITSON (CA SBN 253992)
13 Attorneys for JPMORGAN CHASE BANK,
14 NATIONAL ASSOCIATION
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